APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 22, 1976
CERTIORARI GRANTED MARCH 28, 1977

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA, *Petitioners*

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APPENDIX

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

No. 73-1970 Section "E"

CITY OF LAFAYETTE, LOUISIANA AND CITY OF
PLAQUEMINE, LOUISIANA

v.

LOUISIANA POWER & LIGHT COMPANY,
MIDDLE SOUTH UTILITIES, INC.,
CENTRAL LOUISIANA ELECTRIC COMPANY, and
GULF STATES UTILITIES COMPANY.

Docket Entries

Date	Proceedings
7/24/73	Complaint (3) summs & (1) long arm issued
12/ 3/73	Deft. Louisiana Power & Light *Answer*
1/17/74	Pltf's reply to counterclaim of Louisiana Power & Light Co.
1/18/74	Deft. Louisiana Power & Light Co. mtn for leave to amend & suppl. answer & counterclaim in antitrust action, hrg. set for 1/30/74
1/30/74	HRG. on mtn by Louisiana Power & Light Co. for leave to amend, counsel for deft. requested that this mtn be striken from the docket of 1/30/74 (U.S. Mag. HL) ent 1/30/74
2/11/74	Pltf's reply to amended counterclaim of Louisiana Power & Light Co.
2/13/74	ME. & ORDER that deft Louisiana Power mtn for leave to amend etc. is GRANTED U.S. Mag. HL ent 2/13/74
7/23/74	Mtn by deft Louisiana Power & Light for leave to amend & suppl. answer and counterclaim in antitrust action, hrg. set for 9/11/74

Date	Proceedings
9/11/74	HRG. on mtn by La. Power & Light Co. for leave to amend and supl answer and counter-claim in antitrust action SUBMITTED
9/13/74	ME & ORDER that the mtn by Louisiana Power & Light Co. for leave to amend & suppl answer & Counter-Claim in antitrust action be DENIED (FJC) ent 9/13/74
10/ 1/74	Mtn of Louisiana Power & Light Co. for reconsideration, or in the Alternative amendment of Order, hrg. set for 11/20/74
11/ 6/74	Mtn & Order that mtn set for 11/20/74 is continued to 12/4/74 (FJC) ent 11/7/74
11/12/74	Pltf's mtn to dismiss Louisiana Power & Light Co.'s, hrg. set for 12/4/74
12/ 4/74	HRG. on mtn Matter *SUBMITTED*
1/ 6/75	Transcript of proceedings in open court taken on 12/4/75
3/ 3/75	ME & ORDER that Pltf's mtn to dismiss counterclaim is GRANTED and mtn of LP&L is GRANTED. (see record for reasons) (FJC) 3/3/75
3/13/75	ORDER for final judgment that counter-claim of deft LP&L against Cities of Lafayette is dismissed. (FJC) 3/13/75
3/31/75	NOTICE OF APPEAL
3/31/75	BOND FOR COST OF APPEAL
4/11/75	Deft.'s Mtn & Order Retention of Record pending appeal. 4/8/75 FJC
4/11/75	Deft.'s Designation of Record for Appeal

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1905

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA

v.

LOUISIANA POWER & LIGHT COMPANY

Docket Entries

Date	Proceedings
4/15/75	Dup. Notice of Appeal and Clerks Statement of Docket Entries
5/ 7/75	Partial Record or Cert. List
5/13/75	Flg. joint motion for fixing dates for filing briefs (GRANTED—BWS)
7/24/75	Appendix
7/24/75	Brief for Appellant LP&L
9/ 9/75	Brief for Appellee
9/11/75	Addition to Appellees' Brief
9/29/75	Flg appellant's (LP&L) motion for summary disposition by reversal, and, in alternative, for expedited consideration with reply brief and brief in support
10/ 1/75	Reply Brief for Appellant
10/ 6/75	Flg. appellees' opposition to LP&L's motion for summary disposition by reversal
10/30/75	Flg. order DENYING motion of appellant, Louisiana Power and Light Co. for summary reversal; further order DENYING motion for expedited consideration. (HT-LRM-PHR)

Date	Proceedings
12/29/75	Case assigned for 2/11/76
2/11/76	Hearing Panel: LRM-CC-GBT
5/27/76	Opinion Rendered—GBT Reversed & Remd.
6/ 9/76	Appellees Petition for Rehearing En Banc
6/ 9/76	Bill of Costs
6/28/76	Flg. Appellees' letter dtd. 6/25/76 with copy of Sup. Ct.'s decision attached. (CE)
7/19/76	Flg appellees' supplement to pet. for reh. en banc. (T) (J)
10/ 4/76	Order denying Rehearing (en banc)
10/12/76	Flg. Motion by Appellant for Stay of Mandate
10/13/76	Response to motion to stay mandate filed by Appellant
10/18/76	Flg. order DENYING motion to stay mandate (GBT)
10/18/76	Jdgt. as Mdt. Issd. to clerk
11/ 1/76	Partial Rec. Ret. to Clerk
12/29/76	Notice of Flg. of Cert. Pet. on 12/22/76
4/ 4/77	Order of S.C. Granted 3/28/77

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs*

v.

LOUISIANA POWER & LIGHT COMPANY, MIDDLE SOUTH UTILITIES, INC., CENTRAL LOUISIANA ELECTRIC COMPANY, and GULF STATES UTILITIES COMPANY, *Defendants.*

(Filed July 24, 1973)

No. 73-1970

Plaintiffs demand a Jury Trial

SECTION E

Complaint

Plaintiffs, by their attorneys, bring this action against the defendants named herein, and, demanding a jury trial, complain and allege as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action instituted against defendants under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 and 28 U.S.C. § 1337 in order to prevent and restrain, and to recover damages from the defendants resulting from, violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

2. Each of the defendants transacts business and is found within the Eastern District of Louisiana. Each is within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in violation of the antitrust laws as hereinafter alleged have been performed within the Eastern District of Louisiana.

II

THE PARTIES

3. Plaintiffs, City of Lafayette ("Lafayette") and City of Plaquemine ("Plaquemine"), Louisiana are municipal entities organized and existing under the laws of the State of Louisiana. Lafayette, and Plaquemine, prior to and at all times during the period covered by the complaint, have been engaged in the generation and distribution of electric power and energy for residential, commercial, and industrial customers in their respective cities and environs.

4. Defendant Louisiana Power & Light Company, hereinafter referred to as "LP&L," is named a defendant herein. It is a Florida corporation, engaged in the business of generation, transmission, and sale of electric power energy at wholesale and at retail, with its principal place of business in New Orleans, Louisiana. LP&L is a wholly owned subsidiary of Middle South Utilities, Inc.

5. Middle South Utilities, Inc., hereinafter referred to as "Middle South," a Florida corporation, is named a defendant herein. It is a public utility holding company owning and controlling electric operating companies as an integrated electric utility system in the States of Arkansas, Louisiana, Mississippi and Missouri. Constituent parts of its integrated electric utility system operating in Louisiana include its wholly owned subsidiaries, LP&L, and New Orleans Public Service, Inc., providing in Louisiana bulk electric generation and transmission as well as electric wholesale operations together with retail electric distribution operations.

6. Central Louisiana Electric Company, Inc., hereinafter referred to as "CLECO," is named a defendant herein. It is a Louisiana corporation engaged in the business of generation, transmission and sale of electric power and energy at wholesale and at retail, with its principal place of business in Lafayette, Louisiana.

7. Gulf States Utilities, hereinafter referred to as "Gulf States," is named a defendant herein. It is a Texas Corporation engaged in the business of generation, transmission and sale of electric power and energy in Louisiana at wholesale and at retail with offices in Baton Rouge, Louisiana.

III

Trade and Commerce

8. The electric power industry is comprised generally of three functional levels; generation, transmission and distribution. Generation encompasses the conversion into electric power of energy obtained from combustion of fossil fuels, from moving water, from atomic fission or from other energy sources. Transmission refers to the transportation of electric energy via a network of high voltage lines from points of generation to distribution areas. Distribution involves the delivery and sale of electric current to ultimate consumers. Each of the defendants engages in the electric business on all three levels.

9. The electric transmission systems of the defendants are interconnected. Defendants engage in the exchange of electricity with each other, and deal with each other in the purchase and sale of electric power and energy. Defendants are joint owners of major high voltage transmission facilities connecting electric systems in Louisiana and other states.

10. In addition to the electric power and energy which defendants generate in their own plants within the State of Louisiana and which they transmit to each other, defendants engage in the purchase, sale and exchange of electric power and energy with other electric systems within Louisiana. Such power and energy is transmitted through interconnections of defendants to or from other states to meet the electric system needs of defendants and those other electrical systems with which they deal and to maintain system reliability of all such electric systems.

11. Plaintiffs and other entities operate electrical systems in the general area of Louisiana in which defendants' electrical systems are located. Such other entities include Cajun Electric Power Cooperative, Inc. ("Cajun"), formerly operating under the name of Louisiana Electric Corporation ("LEC"), a membership corporation of REA electric distribution cooperatives, and DOW Chemical Company ("DOW"), an industrial corporation which owns and operates electric generation facilities of approximately 400,000 kilowatts. Neither the plaintiffs nor Cajon nor Dow own, control or operate transmission lines to provide any of them with access to, or interconnection with, each other or any electric systems other than those of defendants to effectuate bulk electric power sales to, purchases from, or exchange with, each other or such other electric systems.

12. Virtually all high voltage electric transmission lines and facilities in the area of Louisiana in which are located the electric generation and distribution facilities of plaintiffs, Cajun and Dow are under the exclusive ownership and control of the defendants. Each of the electric systems of the plaintiffs and those of Cajun and Dow are surrounded by one or more of the transmission and distribution systems of defendants. Defendants' transmission systems are interconnected with each other and, through such interconnected systems, defendants dominate and control access to electric systems other than those of defendants in the sale and purchase of electric bulk power. Plaintiffs thus must rely on one or the other of defendants, or on all of defendants jointly, for obtaining transmission of electric power and energy sold by plaintiffs to other electric systems or purchased by plaintiffs from others for resale to their retail customers.

13. On or about August 6, 1968, plaintiffs, together with Cajun and Dow, entered into an Interconnection and Pooling Agreement pursuant to which Cajun agreed to

build certain transmission lines to interconnect its member cooperatives with a generation station to be built by Cajun and with the electric systems of each of the plaintiffs and Dow, providing each of the parties to that Agreement access to transmission capability among and between the parties.

14. Cajun's proposed generation station and transmission lines were intended to be financed by a loan from the Rural Electrification Administration ("REA"), a division of the United States Department of Agriculture, in an amount of $56.5 million. Such loan was authorized by REA in September, 1964, and provided for construction by Cajun of a 200,000 kilowatt generating station and 1,611 miles of transmission lines.

15. The aforesaid August 6, 1968 Interconnection and Pooling Agreement provided for the establishment of an electric power pool, with coordinated planning for the serving of the load requirements of the Cajun electric cooperative members, plaintiffs and Dow. By application of the Agreement, each system would be assured of a four system market for the sale of all of its surplus capacity and secondary energy, and individual systems would size and time the construction of new generators in the best interests of the total pool market, although each individual system would remain ultimately responsible for providing adequate power supply for its own loads by generation expansion or purchase of power. The pool would provide backup electric power and energy for each system, with economy energy exchanges among the pool members.

16. Access by plaintiffs to transmission capability through the Interconnection and Pooling Agreement would have provided for substantial savings to plaintiffs from sharing of reserves, coordination of construction of new generation and consequent investment savings and efficiency savings, and more efficient operation of the existing generating capacity of the systems.

17. Construction of Cajun's electric transmission lines and generation facilities also would have enabled plaintiffs and Cajun to obtain electric power and energy and other coordinated electric services from the Southwestern Power Administration ("SPA"), a division of the United States Department of Interior. Plaintiffs, as owners and operators of municipal electrical systems, and Cajun, on behalf of its electrical cooperative members, are, and during the period covered by the complaint have been, entitled by law to obtain public electric SPA power in preference over defendants and other privately owned utilities. The acquisition of such low cost power, energy and services by plaintiffs from SPA would have resulted in economic advantages to plaintiffs.

IV

Offenses Charged

A. *Conspiracies*

18. Beginning at least at early as 1962, and continuing thereafter up to and including the date of the filing of the complaint, defendants have engaged in continuing unlawful combinations and conspiracies unreasonably to restrain and to monopolize interstate trade and commerce in the generation, transmission and distribution of electric power and energy in violation of Sections 1 and 2 of the Sherman Act.

19. The aforesaid combinations and conspiracies have consisted of continuing agreements, understandings, and concert of action between and among the defendants, the substantial terms of which have been:

(a) to refuse to wheel, or to allow the transmission over transmission lines or connections owned or controlled by the defendants or any of them, of electric power and energy from other wholesale suppliers to plaintiffs, from one plaintiff to another, or from a plaintiff to any electric system other than defendants;

(b) to boycott and refuse to deal with plaintiffs through interconnections, transmission and coordination except on terms that would maintain domination and exclusive control by defendants over electric bulk power supply and that would be harmful to the interests of plaintiffs;

(d) to utilize sham and baseless litigation, threats, coercion, false and misleading statements, and other means for the purpose and with the effect of delaying and preventing the financing, construction and use by Cajun of electric generation and transmission facilities which would have facilitated the implementation of the aforesaid Interconnection and Pooling Agreement of August 6, 1968 and would otherwise have benefited plaintiffs and others;

(e) to engage in other activities for the purpose and with the effect of restraining and eliminating competition in electric power and energy.

20. For the purpose of effectuating and carrying out the aforesaid combinations and conspiracies, the defendants have done those things, which as described in Paragraph 19 of this Complaint, they agreed to do.

B. *Attempts to Monopolize and Monopolization*

21. Beginning at least as early as 1962, and continuing thereafter to and including the date of the filing of this complaint, defendants have engaged in a continuing attempt to monopolize and have monopolized interstate trade and commerce in the generation, transmission and distribution of electric power and energy in violation of Section 2 of the Sherman Act.

22. Pursuant to and in furtherance of the aforesaid attempt to monopolize and monopolization, defendants have:

(a) obstructed and prevented the construction and operation by others of electric generation and

transmission systems which would compete with defendants in the generation, transmission and bulk sale of electric power and energy,

(b) refused and threatened to refuse to transmit electric power and energy for, to and from sources other than those which would maintain dominance and control by defendants over bulk power supplies and which would prevent competition with defendants in the generation, transmission and sale of electric power and energy,

(c) engaged in activities to foreclose suppliers and potential suppliers of bulk electric power from markets served by defendants, and

(d) performed those acts set forth in Paragraph 19 of this complaint which they had agreed to.

23. The aforesaid offenses will continue unless the relief hereinafter prayed for is granted.

V

Effects

24. The aforesaid unlawful combinations and conspiracies, attempt to monopolize and monopolization, have had the following effects, among others:

(a) Competition in the generation, transmission and wholesale sale and purchase of electric power and energy in interstate commerce has been suppressed and eliminated;

(b) Electric systems other than defendants, and particularly the plaintiffs herein, have been deprived of the benefits of competition in the generation, transmission and wholesale sale and purchase of electric power and energy;

(c) Retail residential, commercial and industrial consumers of electric power and energy have been deprived of benefits ensuing from free and open

competition between electric systems in the generation, transmission, sale and purchase of electric power and energy;

(d) Plaintiffs have been deprived of their freedom to contract for the generation, transmission, sale and purchase of electric power and energy under terms and conditions most favorable and beneficial to them and their citizens.

VI

Injury to Plaintiffs

25. As a direct and proximate result of the unlawful conduct hereinabove alleged, plaintiffs have: (1) been prevented from and continue to be prevented from profitably expanding their businesses; (2) lost and continue to lose the profits which would have resulted from the operation of an expanded, more efficient and lower cost business; (3) been deprived of and continue to be deprived of economies in the financing and operation of their systems; (4) sustained and continue to sustain losses in the value of their businesses and properties; and (5) incurred and continue to incur excessive costs and expenses they otherwise would not have incurred. Plaintiffs have not at this time ascertained the dollar amount of said damages.

VII

Prayer

Wherefore, plaintiffs pray:

1. That the court adjudge and decree that defendants, and each of them, have engaged in combinations and conspiracies unreasonably to restrain and to monopolize, and have attempted to monopolize and have monopolized, the aforesaid interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That each of the defendants and all persons, firms and corporations acting on its behalf or under its direction or control be permanently enjoined from engaging in carrying out, or renewing, any contracts, agreements, policies, practices, understandings, plans, programs or other arrangements, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations of the Sherman Act or any contract, agreement, policy, practice, understanding, plan, program or arrangement having like or similar purpose or effect.

3. That the plaintiffs have such other and further relief as is necessary and appropriate.

4. That each of the plaintiffs recover from the defendants its damages, pursuant to and on the basis provided by Section 4 of the Clayton Act.

5. That each of the plaintiffs be awarded its reasonable attorneys' fees and costs as provided by Section 4 of the Clayton Act.

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By s/ Worth Rowley
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Attorneys for Plaintiffs Lafayette, City Hall, Lafayette, Louisiana 70501, and Plaquemine, Louisiana, City Hall, Plaquemine, Louisiana, 70764

PLEASE SERVE:

Central Louisiana Electric Company
Through Agent for Service of Process
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or
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Pineville, Louisiana

Louisiana Power & Light Company
Through Agent for Service of Process
Melvin I. Schwartzman
or
Andrew P. Carter
1424 Whitney Building
New Orleans, La. 70130

Gulf States Utilities Company
Through Agent for Service of Process
Virgil M. Shaw
446 North Boulevard
Baton Rouge, Louisiana

Middle South Utilities Company
Pursuant to La. R.S. 13:3201 et seq.,
mailing of certified copy of Summons
and Complaint to
280 Park Avenue
New York, N. Y. 10017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

CIVIL ACTION
No. 73-1970

SECTION "E"

(Filed: December 3, 1973)

Answer

FIRST DEFENSE

The complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE

This action is barred in whole or in part by the applicable statute of limitations and by principles of laches and estoppel.

THIRD DEFENSE

The Plaintiffs are not entitled to relief because they have no standing to sue.

FOURTH DEFENSE

Insofar as the activities complained of consist of actions taken by the defendant pursuant to its right to petition government and its right to freedom of speech, and its right not to be deprived of property without due process of law, all rights guaranteed by the Constitution of the United States, these activities are not actionable.

FIFTH DEFENSE

Insofar as the activities complained of consist of attempts made by the defendant to secure executive, legislative, judicial or administrative action by government officials, these activities are not covered by the anti-trust laws, being within the *Noerr-Pennington* exception.

SIXTH DEFENSE

To the extent that the activities complained of consist of responses by the defendant to the illegal activity of

plaintiffs and others, they constitute neither an attempt to monopolize, monopolization or any other violation of the anti-trust laws.

SEVENTH DEFENSE

Insofar as the damages complained of result from decisions of officers of the executive, legislative or judicial branches of federal and State governments, defendant is not liable therefor for any harm which plaintiffs may have incurred.

EIGHTH DEFENSE

Insofar as the activities of defendant complained of were pursuant to State or Federal law governing the electric utility industry, the defendant is not liable under the anti-trust laws for these activities.

NINTH DEFENSE

The FPC has primary jurisdiction of the claims asserted herein. Substantially similar claims have already been asserted by these plaintiffs against certain of the defendants in proceedings now pending before the FPC, and prosecution of this action should accordingly be stayed pending resolution of these various proceedings before the FPC.

ANSWER

Defendant admits that plaintiffs' complaint adopts the statutory language of the Sherman Antitrust Act and decisions interpreting it in stating the conclusion that LP&L has violated the law, but since these conclusions do not relate to the acts alleged in any understandable manner, and since Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations, LP&L denies each and all of the allegations of the Complaint, except that it admits it is engaged in business in the Eastern District of Louisiana, and is a Florida corporation.

COUNTERCLAIM

1. Beginning in 1968 plaintiffs have to this date continually and unlawfully conspired and contracted with

others unreasonably to restrain and monopolize interstate trade and commerce in the provision of electric power and energy in the geographic markets within and adjacent to their respective service areas and those of the Louisiana rural electric cooperatives, have attempted to monopolize said trade and commerce and have in fact monopolized said trade and commerce in areas within their reach and have restrained trade and commerce in those areas. These unlawful activities consist of the following:

(a) Plaintiffs, together with Cajun Electric Power Co-operative, have agreed, conspired, and acted in furtherance of their unlawful ends to engage in sham and frivolous litigation against the defendant, LP&L, and others before the Securities and Exchange Commission, the Federal Power Commission, the Atomic Energy Commission, the United States Justice Department and the Federal courts to injure defendant LP&L in securing private financing of LP&L's business operations and with the purpose and effect of delaying or preventing LP&L's construction of a nuclear electric generating facility;

(b) Plaintiffs have included in their respective debentures covenants to exclude all competition in the provision of electric power and energy within their municipal boundaries;

(c) Plaintiffs entered into an agreement between themselves and among themselves, Louisiana Electric Cooperative (now CEPCO) and The Dow Chemical Company for the provision of electric power and energy in areas within their reach for a longer term than lawful under the laws of the State of Louisiana, thereby excluding and/or attempting to exclude lawful periodic competition for the market comprised of such areas.

2. As a direct and proximate result of the unlawful conduct of the plaintiffs alleged above, defendant has sustained the following injury:

(a) LP&L has been hindered and continues to be hindered in the financing of its business operations;

(b) LP&L has lost, and continues to lose, the profits which it would earn in supplying electricity to the City of Plaquemine;

(c) LP&L has lost the advantages which it would have received from the timely construction of its nuclear generating facility which, if construction were to begin immediately, would cost LP&L 180 million dollars more than if it had been built as scheduled.

LP&L has not at this time ascertained the full dollar amount of said damages.

WHEREFORE, defendant Louisiana Power & Light Company, prays that the Court enter judgment dismissing all claims by plaintiffs against Louisiana Power & Light Company and awarding damages to LP&L treble the amount of damages ultimately suffered by it as the result of the unlawful conduct by plaintiffs.

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Attorneys for Louisiana Power & Light Company

CERTIFICATE

I hereby certify that a copy of the foregoing Answer and Counterclaim has been served upon counsel of record for each party by depositing same, addressed to each trial attorney, in the United States Mail, postage prepaid, on this 3 day of December, 1973.

/s/ ANDREW P. CARTER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION "E"

(Filed January 17, 1974)

Reply to Counterclaim of Louisiana Power and Light Company

Plaintiffs, by their attorneys, for reply to the counterclaim filed herein by defendant Louisiana Power & Light Company, state as follows:

FIRST DEFENSE AS TO ALL CLAIMS

In reply to the counterclaim, paragraph by paragraph, plaintiffs:

1. Deny each and every allegation of paragraph 1 in the counterclaim.

1(a). Deny each and every allegation of subparagraph 1(a) in the counterclaim except that plaintiffs admit they have, to protect their rights and preserve their electric utility operations from illegal activities, properly engaged in litigation in the Federal Courts against defendant Louisiana Power & Light Company (LPL) and others and have intervened and appeared in proceedings involving LPL or others before the Securities and Exchange Commission, the Federal Power Commission, and the Atomic Energy Commission; further, that plaintiffs have petitioned the Federal Government, in particular the United States Department of Justice, to report acts which they believe amount to criminal wrongdoing on the part of LPL and others.

1(b). Deny each and every allegation in subparagraph 1(b) of the counterclaim except that plaintiffs admit that

individually they each have borrowed monies to finance their municipal electric systems and that each said borrowing is and has been pursuant to an Indenture, which contains covenants for the protection of the debenture holders. One such covenant, required by the financings, precludes the granting of electric franchises within the respective borrower's municipal boundaries which would render services or facilities in competition with the municipal electric system. Plaintiffs deny that said convenants are unlawful.

1(c). Deny each and every allegation in subparagraph 1(c) of the counterclaim except that plaintiffs admit that they entered into an agreement between and among themselves, Louisiana Electric Cooperative (now CEPCO) and the Dow Chemical Company for the interconnection, coordination, and pooling of electric energy.

2. Deny each and every allegation in paragraph 2 and each of its subparagraphs of the counterclaim.

3. Each and every allegation of the counterclaim not hereinabove answered is expressly denied.

SECOND DEFENSE AS TO ALL CLAIMS

4. Plaintiffs are municipalities, bodies corporate and politic, subdivisions of the State government. The Sherman Act does not apply to governmental entities or their actions.

THIRD DEFENSE AS TO ALL CLAIMS

5. The counterclaim fails to state a claim upon which relief can be granted.

FOURTH DEFENSE AS TO ALL CLAIMS

6. All or part of each of the claims set forth in the counterclaim is barred by the applicable statute of limitations.

WHEREFORE, the City of Lafayette, Louisiana and the City of Plaquemine, Louisiana respectfully pray that judgment be entered herein dismissing the counterclaim of Louisiana Power & Light Company, and that costs be assessed against said Louisiana Power & Light Company.

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By: /s/ JEROME A. HOCHBERG
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By:
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply to Counterclaim of Louisiana Power & Light Company has been served on all counsel of record for all parties by mail on this 15th day of January, 1974.

/s/ JEROME A. HOCHBERG
Jerome A. Hochberg

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION E

(FILED: JANUARY 18, 1974)

Motion for Leave To Amend and Supplement Answer and Counterclaim in Antitrust Action

Defendant, Louisiana Power & Light Company (LP&L), moves the Court for an order permitting it to amend Answer and Counterclaim filed herein in the following particulars:

I.

That the second line of paragraph 1 of defendant's counterclaim be amended to read: "unlawfully conspired, combined and contracted with others unreasonably to restrain and".

II.

That subparagraph (a) of paragraph 1 of defendant's counterclaim be amended to read as follows:

> "a) Plaintiffs, together with Cajun Electric Power Cooperative, Inc. and Dow Chemical Corporation, have agreed, conspired, combined and acted in furtherance of their unlawful ends to engage in sham and frivolous litigation and related activity against the defendant, LP&L, and others before the Securities and Exchange Commission, the Federal Power Commission, the Federal courts, and have agreed, conspired, combined and acted with said persons, certain members of the Louisiana Municipal Association and others to conduct said unlawful activity before the Atomic Energy Commission and the United States Department of Justice, the purpose and effect of said litigation and activity being to injure the defendant in securing private financing of its business operations and to delay or prevent LP&L's construction of a nuclear electric

> generating facility so that the plaintiffs and others might promote their private gain at the expense of severe injury to the public and to LP&L."

III.

That Defendant's prayer for relief be amended by the addition to the last line of its answer and counterclaim, after the last word thereof, of the following: "plus reasonable attorneys' fees and interest as permitted by law and for such further relief as the Court may deem just and proper."

The grounds of this motion are that justice requires the amendment in order that the actual issues between the parties be tried, since the amendment is necessary to clarify the issues and to include material inadvertently omitted.

Defendant further moves that said amendments be granted, and that the same be taken and treated as made without rewriting the answer filed herein.

Respectfully submitted,

CAHILL, GORDON & REINDEL
DENIS G. MCINERNEY
ALLEN S. JOSLYN
80 Pine Street
New York, New York 10005

MONROE & LEMANN
ANDREW P. CARTER
W. MALCOLM STEVENSON
WILLIAM T. TETE

By /s/ ANDREW P. CARTER
1424 Whitney Building
New Orleans, Louisiana 70130

Attorneys for Louisiana Power & Light Company

CERTIFICATE

I hereby certify that a copy of the foregoing Motion for leave To Amend and Supplement Answer and Counterclaim in Antitrust Action has been served upon counsel of record for each party by depositing same, addressed to each trial attorney, in the United States mail, postage prepaid, on this 18th day of January 1974.

/s/ ANDREW P. CARTER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION "E"

(Filed February 11, 1974)

Reply of City of Lafayette and City of Plaquemine to Amended Counterclaim of Louisiana Power & Light Company

Plaintiffs, by their attorneys, for reply to the amended counterclaim of Louisiana Power & Light Company:

1. Deny all amended paragraphs in the counterclaim as amended to the same effect and with the same treatment as set forth in the Reply to Counterclaim of Louisiana Power & Light Company; and

2. Reassert with respect to the amended counterclaim each and every defense set forth in the Reply to Counterclaim of Louisiana Power & Light Company; and

3. Incorporate this Reply to Amended Counterclaim into and with the Reply to Counterclaim of Louisiana Power & Light Company so as to treat both as one complete Reply without rewriting the initial Reply filed herein.

ROWLEY & SCOTT
1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036
(202) 293-2170

/s/ JEROME A. HOCHBERG
By: Jerome A. Hochberg

SESSIONS, FISHMAN, ROSENSON,
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/s/ ROBERT E. WINN
By: Robert E. Winn

Attorneys for the City of Lafayette, Louisiana and the City of Plaquemine, Louisiana

MINUTE ENTRY
February 11, 1974
Lee, M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action Number 73-1970

SECTION "E"

(Entered Feb. 13, 1974)

There being no opposition to the Motion for Leave to Amend and Supplement Answer and Counterclaim in Antitrust Action Filed by Louisiana Power & Light Company,

IT IS ORDERED that the motion is herewith GRANTED.

CLERK TO NOTIFY COUNSEL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action Number 73-1970

SECTION "E"

(Filed July 23, 1974)

Motion for Leave To Amend and Supplement Answer and Counterclaim in Antitrust Action

Defendant, Louisiana Power & Light Company (LP&L), moves the Court for leave to amend and supplement its Answer and Counterclaim in the particulars set forth in the Amending and Supplemental Answer and Counterclaim appended hereto and for cause shows that the interest of justice so requires in order that the actual issues

between the parties be tried, and further that said amendments be taken and treated as made without rewriting the Answer and Counterclaim filed herein.

Respectfully submitted,

MONROE & LEMANN
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WILLIAM T. TETE

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Telephone: 525-8181

Attorneys for Louisiana Power & Light Company

OF COUNSEL:

CAHILL, GORDON & REINDEL
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New York, New York 10005

Minute Entry
September 12, 1974
Cassibry, J.

[TITLE OMITTED IN PRINTING]

CIVIL ACTION
No. 73-1970

SECTION "E"

(FILED: SEP. 13, 1974)

This cause came on for hearing on September 11, 1974 on motion by Louisiana Power & Light Company for leave to amend and supplement answer and counter-claim in

antitrust action, was argued by counsel for the respective parties and submitted.

Whereupon, and upon consideration thereof:

IT IS ORDERED that the motion by Louisiana Power & Light Company for leave to amend and supplement answer and counterclaim in antitrust action be, and the same is, hereby DENIED.

/s/ FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

Jerome A. Hockberg, Esq.
Robert E. Winn, Esq.
Malcolm Stevenson, Esq.
Walter E. Workman, Esq.
George Spiegel, Esq.
Tom F. Phillips, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

CIVIL ACTION
No. 73-1970

(FILED OCT. 1, 1974)

Motion of Louisiana Power & Light Company for Reconsideration, or in the Alternative, Amendment of Order

Now into Court through undersigned counsel comes defendant Louisiana Power & Light Company and moves that the Court reconsider its Order of Friday, September 13, 1974, in the above-captioned matter and grant defendant leave to amend its counterclaim. If the Court is, and remains, of the opinion that plaintiffs are not subject to the antitrust laws and that the amendment, which is set out in Appendix I hereto, does not state a claim upon which relief can be granted, defendant asks in the alternative that the Court permit the amendment and direct the entry of judgment, upon an express determination that there is no

just reason for delay, against Louisiana Power and Light Company on the entire counterclaim. In the further alternative, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, defendant moves that the Court amend its Order to include the statement required by 28 U.S.C. § 1292(b) that said order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. In addition, LP&L requests the Court to assign written reasons and for clause shows:

(1) Since the principal ground set forth in opposition to leave to amend is also applicable to the unamended counterclaim, orderly disposition of the question requires that leave be granted to defendant to amend and that plaintiffs thereafter address their argument to the amended counterclaim, and

(2) The weight of authority supports defendant's position that the antitrust laws do apply to the conduct of a municipally-owned electric system when, under the law of the State wherein the municipality is situated, that system does not act as a governmental agent for the State in its operations, and

(3) That the principal ground set forth in the opposition to the counterclaim, the absolute immunity of municipally-owned electric systems, although erroneous, would require the dismissal of the entire counterclaim, thus there is no just reason for delay in entering judgment against Louisiana Power & Light Company if it adheres to the belief that ground is well-founded, and

(4) The granting of motion for leave to amend or the amendment of the Court's Order would expedite the termination of this litigation since the same question of law would ultimately be presented with respect

to the unamended counterclaim and defendant has just cause to commence a separate antitrust action against plaintiffs as shown by attached affidavit of J. M. Wyatt, Appendix II, hereto.

Wherefore, Louisiana Power & Light Company respectfully moves that the Court reconsider its Order of Friday, September 13, 1974, and grant defendant leave to amend, that if the Court is and remains of the opinion that the amendment does not state a claim upon which relief can be granted, in the alternative that the Court direct the entry of judgment, upon an express determination that there is no just reason for delay, against defendant with respect to defendant's entire counterclaim, or in the further alternative, that the Court amend said Order to include the statement that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation and further that the Court assign written reasons.

Respectfully submitted,

Monroe & Lemann
Andrew P. Carter
W. Malcolm Stevenson
William T. Tete

By: /s/ Andrew P. Carter
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New Orleans, Louisiana 70130

Attorneys for Louisiana Power & Light Company

Of Counsel:

Cahill, Gordon & Reindel
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APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Title Omitted in Printing]

Civil Action

No. 73-1970

Section "E"

Amending and Supplemental Answer and Counterclaim in Antitrust Action

Defendant, Louisiana Power & Light Company (LP&L), amends its Answer and Counterclaim filed herein in the following particulars:

I

Paragraph 1 of defendant's Counterclaim is amended by the addition of subparagraph (d) to follow subparagraph (c) on page 3 of said Answer and Counterclaim to read as follows:

"d) Plaintiff, City of Plaquemine, has unlawfully restrained trade and conspired with other municipalities in the State of Louisiana in violation of § 1 of the Sherman Act, § 3 of the Clayton Act, and the Louisiana law of public utilities by contracting to provide customers outside city limits certain products (e.g., gas and water) only on the condition that said customers also purchase a different tied product, i.e., electricity, or at least agree that they will not purchase that tied product from any other supplier."

II

Paragraph 2 of defendant's Counterclaim is amended by the addition of subparagraph (d) to follow subparagraph (c), which ends on page 4 of said Answer and Counterclaim, to read as follows:

"d) LP&L has lost, and continues to lose, the profits which it would earn in supplying electricity in the

areas adjacent to but outside the city limits of the City of Plaquemine and other municipalities."

III

The defendant's prayer for relief is amended by the addition to the end thereof of the following:

"Louisiana Power & Light Company also prays that the Court enjoin the City of Plaquemine from entering into unlawful tie-in contracts as set forth above and declare null and void all such contracts heretofore entered into by Plaquemine. In the alternative, should the Court determine that treble damages are not due Louisiana Power & Light Company under federal law, Louisiana Power & Light Company prays that the Court award it any and all compensatory damages which are due Louisiana Power & Light Company under the laws of the State of Louisiana."

The grounds of this motion are that justice requires the amendment in order that the actual issues between the parties be tried.

Defendant further moves that said amendments be granted, and the same be taken and treated as made without rewriting the Answer filed herein.

Respectfully submitted,

CAHILL, GORDON & REINDEL
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New York, New York 10005

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Attorneys for Louisiana Power & Light Company

APPENDIX II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

Affidavit of J. M. Wyatt

PARISH OF ORLEANS
STATE OF LOUISIANA } ss:

J. M. Wyatt, being first duly sworn, on knoweldge, information and belief deposes and says:

I am Senior Vice-President of Louisiana Power & Light Company (LP&L). Plaintiffs are both members of an unincorporated association of representatives of municipality utility personnel, known as the Louisiana Municipal Association Utilities Group (LMAUG), whose purpose may be described as representing the common interests of such municipally-owned utility systems.

In the course of operating our business, numerous instances have come to our attention in which the individual members of Louisiana Municipal Association Utilities Group have required persons living outside municipal corporate limits to take electricity from them in order to get gas, water, and in some instances sewerage services.

With respect to Plaquemine Light and Water, it was reported in the *Greater Plaquemine Post* of 13 July 1972 that the City had agreed to serve "South Plaquemine" (outside the corporate limits of Plaquemine) with water "provided these customers buy electricity from the City." (Appendix A) Subsequently, the reports of a policy of tie-ins have been confirmed by LP&L personnel, who have been advised by residents of the area immediately to the south of Plaquemine that the municipal utility system has refused to provide them with gas or water unless they agreed to take electric service from the City rather than from LP&L.

Instances of parallel conduct among other municipal electric systems have been reported. For example, in a Legal Advertisement placed in *The Daily Comet* (Lafourche Parish) on Wednesday, March 6, 1974, the minutes of the proceedings of the Board of Trustees of the City of Thibodaux (Appendix B, third page), a request for sewerage services by the Terrebonne Bank and Trust Company was considered. It is reported: "The Trustees agreed that they would be happy to furnish their sewerage servce to the Bank of Terrebonne at no cost to the City, provided they use the City's utility services since this has always been a policy of the City." Subsequently, it was reported by LP&L personnel, the City of Thibodaux agreed to furnish sewerage service to a parish school situated outside the city limits, provided that the school also take electricity.

The earliest example of such conduct that has come to my attention is that of the City of Jonesboro. In the report of the proceedings of the Town Council of Jonesboro of August 13, 1963, published in the *Jackson Independent* of August 22 (Appendix C) it is reported:

> "Motion by T. L. Colvin & seconded by J. P. Gimber that an ordinance be adopted to refuse the sale of water to anyone, except electrical customers of the Town of Jonesboro, Louisiana
>
> All voted in favor thereof."

LP&L personnel have reported that as recently as late 1972 residents outside the city limits have been forced to take electricity from Jonesboro rather than LP&L in order to get water.

In addition to the above, LP&L personnel have reported that the City of Houma has refused to serve residents outside its city limits with gas and sewerage unless they agreed to take electricity from the municipal electric system. They have reported many instances in which the City of Monroe has refused gas, water and/or sewerage to

persons outside the city limits unless they agreed to take electricity from the City. Mr. Roy Lange, General Manager of the City of Monroe Utilities Commission, has testified that on behalf of that municipality, he offered General Motors Corporation gas, water, and electricity as a "package" agreement for their plant outside the City limits and not as individual agreements. Monroe now serves those customers with electricity although LP&L had adequate electric facilities on the General Motors property many years before the City of Monroe solicited General Motors and then constructed duplicating facilities to the plant site.

Another city which appears to practice tie-ins is the City of Winnfield. Employees of LP&L have reported an instance of requiring a customer to take electricity in order to get water in 1973. However, Winnfield may not be a member of LMAUG.

LP&L does not serve customers in the immediate area of plaintiff, Lafayette, and therefore has no direct knowledge of whether that municipal utility system imposes similar restraints on commerce in electricity. However, it does believe that even before discovery, it had obtained sufficient evidence of parallel action in restraint of trade by members of the LMAUG to warrant an inference of combination or conspiracy. The regular practices of the members of the LMAUG with respect to selling gas and water only upon condition that a customer take electricity would seem to be in violation of the Sherman Act and the Clayton Act, as we understand these laws.

/s/ J. M. Wyatt
J. M. Wyatt

Sworn to and Subscribed Before Me on the 30th Day of September, 1974.

/s/ Steven O. Medo Jr
Notary Public

My Commission is issued for life.

Appendix A

CITY WANTS TO SELL ELECTRICITY TO SOUTH PLAQUEMINE AREA

The City of Plaquemine is continuing its massive search for additional revenue, and at Tuesday night's meeting the Council voted to close the gap on a couple of revenue-producing avenues which have, until now, been left wide open.

First of all the Council authorized Mayor Gallagher to contact the Louisiana Power and Light Co. to negotiate a purchase of poles, transformers and lines which are presently servicing the City Trailer Court, the residences on Lucky Street, and the Cottage Tourist Courts in South Plaquemine. Mayor Gallagher explained that the City agreed to service this area with water some years ago provided these customers buy electricity from the City. The Mayor said the late 'Mr. Gus' Pizzolato had negotiated the agreement with the City, since the trailer park, the residences on Lucky Street, and the Tourist Courts were either owned by him or members of his family.

The Mayor explained that he would contact Louisiana Power and Light Co., and attempt to negotiate a purchase of their facilities. He said if this is not possible then the City would run its own lines to service the area. The Council gave him a green light to proceed. The Mayor said the family was agreeable to the change-over.

Appendix B

LEGAL ADVERTISEMENT

LEGAL NOTICE

Proceedings of the Board of Trustees
City Hall
Thibodaux, Louisiana
January 29, 1974

The Board of Trustees of the City of Thibodaux, State of Louisiana met in regular session at its regular meeting place, City Hall, Thibodaux, Louisiana, on Tuesday, January 29, 1974 at three (3:00) o'clock p.m.

Present and answering roll call were the following members:

Honorable Warren J. Harang, Jr., Trustee of Public Safety and Ex-Officio Mayor; Honorable Bertrand F. Herbert, Trustee of Public Property and Honorable Joe N. Silverberg, Trustee of Finance and Ex-Officio Tax Collector.

There were absent: none.

Also present was Mr. David Richard, City Attorney.

On motion of Trustee Harang, seconded by Trustee Silverberg, the minutes of January 22, 1974 were unanimously approved.

• • • •

(portions of Appendix B omitted in printing)

• • • •

Trustee Harang presented a letter for Mr. Royce J. Pierce, Project Coordinator for Rizzo-Thibodeaux and Associates, Inc., requesting the City of Thibodaux to allow the Terrebonne Bank & Trust Company to be connected to the city's sewerage facilities.

The Trustees agreed that they would be happy to furnish this sewerage service of the Bank of Terrebonne at no

cost to the city, provided they use the city's utility services since this has always been a policy of the City.

The Clerk was instructed to write to Mr. Pierce of the Board's decision,

• • • •

(remaining portions of Appendix B omitted in printing)

APPENDIX C

PROCEEDINGS OF TOWN COUNCIL OF JONESBORO

Jonesboro, Louisiana
August 13, 1963

The Town Council met on the above date, in regular session, at the regular meeting place. The City Hall, Jonesboro, Louisiana, at seven thirty (7:30) o'clock P.M. with the following members present to-wit:

Mayor: L. O. Tait
Alderman: E. L. Thompson
Alderman: E. E. Rogers
Alderman: T. L. Colvin
Alderman: R. L. Salter
Alderman: J. P. Gimber
Absent: None

Motion by T. L. Colvin & seconded by J. P. Gimber that minutes of June 11, 1963, be approved as read.

Motion was carried.

Motion by J. P. Gimber seconded by T. L. Colvin that a Resolution be adopted to approve a Sub-Lease from Jackson Parish Fair Asso'n. to Jonesboro Hodge riding Club for Rodeo Arena Area.

Motion was carried.

Motion by T. L. Colvin & seconded by E. L. Thompson that the lease with Tremont Lumber Company be approved, at annual rental of $25.00 for water Well purposes.

Motion was carried.

Motion by R. L. Salter & seconded by E. E. Rogers to accept low bid of Eddington Drilling Company, in the amount of $19,321.00 for drilling; of water well & installation of all necessary Equipment for proper operation thereof. And ratify Mayor's execution of contract for same.

Motion was carried.

Motion by T. L. Colvin & seconded by J. P. Gimber that an ordinance be adopted to refuse the sale of water to anyone, except electrical customers of the Town of Jonesboro, Louisiana.

All voted in favor thereof.

Motion by E. L. Thompson & seconded by R. L. Salter that meeting adjourn.

Meeting adjourned.

L. O. Tait
Approved
Ralph Nunn
Attested
Aug. 22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 73-1970

SECTION "E"

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs*

v.

LOUISIANA POWER & LIGHT COMPANY, MIDDLE SOUTH UTILITIES, INC., CENTRAL LOUISIANA ELECTRIC COMPANY, and GULF STATES UTILITIES COMPANY, *Defendants.*

(Filed November 12, 1974)

Motion To Dismiss Louisiana Power & Light Company's Counterclaim, as Amended, and for Judgment on the Pleadings with Respect to Said Counterclaim Pursuant to the Second Defense of Plaintiffs' Reply to Said Counterclaim

Plaintiffs, City of Lafayette and City of Plaquemine, move the Court to dismiss Louisiana Power & Light Company's Counterclaim, as amended, and for judgment on the pleadings with respect to said Counterclaim pursuant to the Second Defense of Plaintiffs' Reply to said Counterclaim on the grounds that said Counterclaim charges antitrust law violations which are not applicable to the states or their instrumentalities. The plaintiffs are municipalities, bodies corporate and politic and subdivisions of the State of Louisiana. As such, the Counterclaim, as

amended, does not assert a valid claim and should be dismissed.

Respectfully submitted,

ROWLEY & SCOTT

By JEROME A. HOCHBERG
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(202) 293-2170

SESSIONS, FISHMAN, ROSENSON, SNELLINGS & BOISFONTAINE

By ROBERT E. WINN

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Attorneys for City of Lafayette and City of Plaquemine

Dated: November 11, 1974

MINUTE ENTRY
February 28, 1975
Cassibry, J.

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION "E"

(Filed March 3, 1975)

Order

IT IS THE ORDER OF THE COURT that the motion of LP&L to amend its' counterclaim be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to dismiss the entire counterclaim, as amended, be, and the same is hereby GRANTED.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate determination of this litigation. 28 U.S.C. § 1292(b).

REASONS

This action by the Cities of Lafayette and Plaquemine, Louisiana, alleges antitrust violations on the part of Louisiana Power & Light Co., a Louisiana public utility (hereinafter LP&L), and others; plaintiffs seek injunctive relief and treble damages.

LP&L answered the suit and also filed a counterclaim, in which it alleged antitrust violations on the part of the plaintiff cities. Plaintiffs submitted an answer to the counterclaim denying all allegations. LP&L then filed a motion to amend its counterclaim and this motion was granted without opposition.

Subsequently, LP&L filed a new motion to amend its counterclaim, to include in it, allegations of Sherman and Clayton Act violations by plaintiffs in connection with certain tie-in arrangements. Specifically, LP&L claims that the City of Plaquemine has adopted a practice of offering residents outside of their municipal limits, such services as water, gas and sewerage, but only on the condition that they take electric service from the city and not from another supplier, *i.e.*, LP&L.

On September 13, 1974, this court denied LP&L's motion to amend its counterclaim holding that the antitrust laws of the United States do not apply to activities which are purely those of the state or its instrumentalities.

LP&L thereafter, filed a motion for reconsideration of this order. Simultaneously, the plaintiffs filed a motion to dismiss the original counterclaim. It is agreed among the parties that if the amended counterclaim is improper then the original counterclaim must fail for the same reason.

The sole issue therefore, is whether the antitrust laws of the United States are applicable to activities of a state or its municipalities.

Plaintiffs contend that the doctrine of nonapplicability of the antitrust laws to the states is a longstanding and well established rule. Once it is determined that the activities are those of the state no further inquiry is appropriate because the antitrust laws do not apply. See *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974).

LP&L disagrees, and contends that the proper analysis of antitrust allegations against a state or its instrumentalities is a two step process. First, the court examines whether state activity is involved and secondly, the court decides whether the state is acting in a governmental capacity. Unless *both* steps are satisfied the state's actions can and should be answerable under the antitrust laws.

In essence LP&L argues that if the state's activity is proprietary in nature then the antitrust laws *do* apply.

The inapplicability of the antitrust laws to the states was first enumerated in *Parker* v. *Brown*, 317 U.S. 341 (1943). The Supreme Court noted that:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . .
>
> There is no suggestion of a purpose to restrain state action in the Acts's legislative history. 317 U.S. at 351-52.

Subsequent cases have adopted as the rule of the *Parker* Case that the antitrust laws do not apply to state governmental actions, including those delegated to an agency or municipality of the state. *See Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974).

However, other cases treat *Parker* in a less expansive way, permitting a court to examine the type or extent of state activity involved. *See Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Buildings Inc.*, 424 F.2d 25 (1st Cir. 1970). However, these cases generally involve state action, in concert with private enterprise, thereby distinguishing them from the instant case.

The Fifth Circuit Court of Appeals in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) has recently addressed itself to the question. The decision in that case clearly holds that state governmental entities

are "outside the ambit of the Sherman Act. 487 F.2d at 1028.

In *Saenz*, a slide rule manufacturer brought a treble damage action alleging that the defendants had violated Section 1 of the Sherman Act by conspiring to effect the rejection of plaintiff's product for use in interscholastic competition among Texas public schools. The defendants included the University Interscholastic League (UIL), its director, Lenhart, and L. R. Ridgway Enterprises, Inc., a competitor of the plaintiff's whose product was ultimately selected for use in the competition. UIL and Lenhart filed motions to dismiss the complaint on the grounds that as a state agency and state official, they were not answerable under the Sherman Act. The district court granted defendants' motions and the Fifth Circuit affirmed. The Court of Appeals concluded:

> . . . . the League is a governmental entity exempt from the Sherman Act.
>
> As this Court has previously said, '. . . . it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action.' *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968).

The language of the *Saenz* case is clear, however, its applicability to this case is less certain. *Saenz* involves a state instrumentality, namely the UIL, acting in a capacity and in an area that is generally considered to be exclusively state governmental activity, i.e., education of its citizens. The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and

implication of the *Saenz* case it shall be this court's holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States.

In order to clarify the record, and place the issue in the most favorable posture for appeal, it shall be the order of the court that LP&L's motion to amend its counterclaim be granted and the entire counterclaim, as amended, be dismissed.

/s/ Fred J. Cassibry
United States District Judge

Worth Rowly, Esq.
George Spiegel, Esq.
Robert E. Winn, Esq.
Tom F. Phillips, Esq.
Denis McInerney, Esq.
Andrew P. Carter, Esq.
William O. Bonin, Esq.
Walter E. Workman, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Title Omitted in Printing]

Civil Action Number 73-1970

Section "E"

(Entered March 13, 1975)

Order for Final Judgment

On the prior Order of this Court dated February 28, 1975 and entered March 3, 1975, it being the determination of this Court that there is no just reason for delay in entering final judgment on defendant Louisiana Power & Light Company's entire amended counterclaim, it having been agreed by counsel for Louisiana Power & Light Company that its appeal of this matter will not delay prosecution of plaintiffs' claim, it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

Ordered, that final judgment be entered herein that said counterclaim of defendant Louisiana Power & Light Company, as amended, against each of the cities of Lafayette and Plaquemine be, and hereby is, dismissed.

Done this 13 day of March 1975.

/s/ Fred J. Cassibry
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[Title Omitted in Printing]

Civil Action Number 73-1970

Section "E"

Notice of Appeal

Notice is hereby given that Louisiana Power & Light Company, a defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final order entered, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, dismissing defendants' counterclaim in this action on the 13th day of March, 1975.

March 31, 1975.

Monroe & Lemann
Andrew P. Carter
W. Malcolm Stevenson
William T. Tete
Kenneth P. Carter

By /s/ Andrew P. Carter
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New Orleans, Louisiana 70130
Telephone: 586-1900

Attorneys for Louisiana Power & Light Company

CERTIFICATE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal has been served upon counsel of all parties of record in the foregoing proceeding, by depositing a copy of same in the U.S. Mails, postage prepaid, this 31 day of March, 1975.

/s/ William T. Tete

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs and Appellees,*

v.

LOUISIANA POWER AND LIGHT COMPANY, *Defendant and Appellant.*

Appeal from the United States District Court for the Eastern District of Louisiana

(MAY 27, 1976)

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

TJOFLAT, *Circuit Judge.*

The sole question in this appeal is whether the actions of a city are automatically outside the scope of the federal antitrust laws. Answering in the negative, we reverse the decision below and remand for further proceedings.

I

A complaint filed on July 24, 1973, by the cities of Lafayette and Plaquemine, Louisiana (the Cities), alleged that appellant Louisiana Power & Light Company (Power & Light) and three other privately owned utilities had violated Sections 1 and 2 of the Sherman Act.[1] The allegations of this complaint are not involved in the present appeal. In its amended counterclaim, Power & Light charged the Cities with having themselves violated the federal antitrust laws in several respects. These allegations can be summarized as follows: (a) that the Cities were conducting sham litigation in order to delay or prevent Power & Light's construction of a nuclear power plant; (b) that anticompetitive covenants were included in the Cities' deb-

[1] 15 U.S.C. Sections 1, 2.

entures;[2] (c) that the Cities had conspired with other parties to extend the provision of power to certain service areas beyond the time periods allowed by state law; (d) that the city of Plaquemine was requiring customers outside its city limits to purchase electricity from the city in order to obtain gas and water. All of these actions were alleged to violate Sections 1 and 2 of the Sherman Act. The "tie-in" of electricity to gas and water was alleged to violate Section 3 of the Clayton Act,[3] as well. In its order of February 28, 1975, the trial court dismissed the entire counterclaim. While noting its reluctance to exempt an enterprise which was "clearly a business activity" from the antitrust laws, the court held that the plaintiffs' status as cities was sufficient to bring all their conduct within the "state action" exemption as announced in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and as interpreted by this Court in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). Following the entry of final judgment dismissing Power & Light's counterclaim on March 13, 1975, this appeal was taken.

II

In *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Supreme Court has defined the extent to which state governmental entities are exempt from the antitrust laws. The earlier case was a suit to enjoin the enforcement of an agricultural marketing program which had been established by a California statute. Noting that the program "derived its authority and its efficacy from the legislative command of the

[2] These covenants were described as "covenants to exclude all competition in the provision of electric power and energy within [the plaintiffs'] municipal boundaries." Trial Record at p. 14. The specific nature of the alleged covenants cannot be determined from the record before this Court.

[3] 15 U.S.C. Section 14.

state . . . ", 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 326, the Court held that the defendants' conduct was beyond the reach of the Sherman Act.[4] The Court could "find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," *id.* at 350, 51, 63 S.Ct. at 313, 87 L.Ed. at 326. By legislative command, the state had adopted an anticompetitive program and prescribed the terms of its operation. Violations were punishable under the state's penal code. In the Court's view, a restraint which the state, "as sovereign, imposed . . . as an act of government . . . ", could not be made the basis for Sherman Act liability. *Id.* 317 U.S. at 352, 63 S.Ct. at 314, 87 L.Ed. at 327.

The trial court in the present case acted without the benefit of the Supreme Court's only major post-*Parker* explication of the "state action" doctrine. In *Goldfarb*, *supra*, the High Court was faced with a Sherman Act challenge to minimum fee schedules published by a county bar association and enforced by the Virginia State Bar. The state bar was a state agency by law, *id.* 421 U.S. at 789-90, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 586-587, and both lower courts in *Goldfarb* had held that the bar qualified for the "state action" exemption.[5] Without dissent,

[4] The Court was willing to assume that the alleged activities would be illegal if carried out by private persons. 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 325.

[5] In contrast to the state bar, the county bar was a private association which was not a state agency by statute and which received no active state supervision. The district court, 355 F.Supp. 491 (E.D.Va. 1973), held that the county bar was subject to the antitrust laws. The Court of Appeals, 497 F.2d 1 (4th Cir. 1974), agreed that the county bar was not covered by the "state action" exemption. However, its activities were seen as falling within a "learned profession" exemption to the Sherman Act, and as having an insufficient impact upon interstate commerce. Since the county bar, unlike the state bar in *Goldfarb*, and unlike the Cities in the present case, was not a governmental entity, the Supreme Court's disposition of its contentions will not be discussed here.

the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislature grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.[8] A district judge's inquiry on this point should

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ently have found an exemption if the Supreme Court of Virginia, acting within the intended scope of its legislative grant, had established minimum fees. See 421 U.S. at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. See also note 8, *infra*.

[8] Our resolution of these general issues is in accord with that of the Third Circuit in *Duke & Co.* v. *Foerster*, *supra*, 521 F.2d at 1279-80. We have carefully studied the authorities cited by plaintiffs and have found nothing that directly contradicts the position which we take in this case. Unlike *Duke & Co.* and the present case, none of these decisions dealt with municipalities. Almost all of them are pre-*Goldfarb*. To the extent that *State of New Mexico* v. *American Petrofina*, 501 F.2d 363 (9th Cir. 1974) might be read as extending the "state action" exemption to lower governmental bodies' activities which were not contemplated by the legislature, we must regard it as in conflict with the Supreme Court's later decision in *Goldfarb*.

Brief mention should be made of plaintiffs' argument that a decision such as this will lead to undesirable variations in the application of the antitrust laws, since the governmental activities subject to the *Parker-Goldfarb* exemption will differ from state to state. We regard this as an inevitable result of the emphasis in *Parker* and *Goldfarb* upon the scope of legislative intent. For instance, the *Goldfarb* Court made it clear that a statute specifically establishing minimum fee schedules would lead to a "state action" umbrella. 421 U.S. at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587. Such an emphasis upon what state laws provide will necessarily lead to variations, dependent upon the differing will of state legislatures.

Plaintiffs also draw our attention to the dicta in *Goldfarb* which suggest that the Supreme Court of Virginia could, without new

the Supreme Court rejected this contention. Although the state legislature had authorized the Supreme Court of Virginia to regulate the practice of law, *id.*, at 788, 95 S.Ct. at 2014, 44 L.Ed.2d at 585, that court had taken no action to fix lawyers' fees, *id.* 421 U.S. at 789, 95 S.Ct. at 2014, 44 L.Ed.2d at 586. Nor was there any state statute which directed members of the bar to establish minimum fee schedules. Therefore, the state bar's participation in price fixing failed to satisfy the "threshold inquiry" under *Parker*, i.e., "whether the activity is required by the State acting as sovereign," *id.* at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587.

Taken together, these two controlling precedents require the following analysis. A subordinate state governmental body[6] is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent.[7] Thus, a trial judge may ascertain, from

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[6] Plaintiffs would have us equate cities and states for purposes of determining "state action". No authority is cited for this proposition, and the only appellate decision directly on point has resolved this issue against plaintiffs. See *Duke & Co.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975). Moreover, it can scarcely be said that, as a general proposition, cities are automatically entitled to whatever legal protections the state itself can claim. Thus, for example, cities, counties, and other state political subdivisions are not considered "the state" for purposes of Eleventh Amendment immunity. See *Edelman* v. *Jordan*, 415 U.S. 651, 667 n. 12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Fay* v. *Fitzgerald*, 478 F.2d 181, 184 n. 3 (2d Cir. 1973); *Markham* v. *City of Newport News*, 292 F.2d 711, 716-17 (4th Cir. 1961).

[7] The opinion in *Goldfarb* does not support defendant's claim that every alleged anticompetitive activity must be specifically approved by the legislature. Thus, the *Goldfarb* Court would appar-

be broad enough to include all evidence which might show the scope of legislative intent.[9]

III

The Cities argue that a decision adverse to them would necessarily overrule this Court's prior opinion in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). We are reminded of the general rule that one panel cannot overrule the holding of a previous panel of the same court. See *United States* v. *Automobile Club Ins. Co.*, 522 F.2d 1, 3 (5th Cir. 1975). However, we do not regard our decision as irreconcilably inconsistent with that in *Saenz*. The complaint in that case alleged that the director of a state slide rule contest induced a state agency to define its regulations so as to exclude the plaintiff's slide rules from use in the contest. This action allegedly resulted from an unspecified economic tie between the director and a slide rule manufacturer which competed with plaintiff. As the panel noted, *id.* at 1028, the charge of an economic relationship between the director and the rival manufacturer was entitled to no weight since plaintiff could not simply

statutory authority, impose minimum fee schedules by means of court rules. *Id.* at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. Our reading of *Goldfarb* is that such rule-making would lead to a "state action" exemption only if the state court's rules fell within the intended scope of its legislative authority "to regulate the practice of law", *id.* 421 U.S. at 788, 95 S.Ct. at 2014, 44 L.Ed. at 586.

As a final point, we cannot accept defendant's invitation to import the discredited proprietary-governmental distinction into this area of the law. This contention is unsupported by authority and is irrelevant under *Parker* and *Goldfarb*, which look only to the scope of the legislative action and not the "proprietary" or "governmental" nature of the subordinate governmental body's conduct.

[9] Therefore, we reject the capricious limitation suggested by counsel at oral argument, which would restrict a court's inquiry to the pertinent statutes themselves.

rely on his pleadings in the face of opposing affidavits. Stripped of the unsupported charge of financial influence, the allegations in *Saenz* must be seen as having stated no more than that (a) the director, "clearly acting within the scope of his duties," *id.* at 1028, determined that plaintiff's slide rule was not a "standard slide rule" which could be employed in the contest, and (b) the agency ratified that decision. It can scarcely be doubted that the agency's actions were within the contemplated scope of the powers conferred upon the state university system (of which the agency was a part) by the Texas legislature. The *Parker-Goldfarb* principle, as we have interpreted it, would clearly exempt such actions from the Sherman Act. We are, therefore, unpersuaded that there is any necessary conflict between our decision and the panel opinion in *Saenz*.

Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis* v. *Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*. The test now is whether the challenged action is the type of activity which the legislature intended the governmental body to perform. This principle has already been tacitly recognized by one post-*Goldfarb* panel of this Court. Faced with an antitrust challenge to a city council's rate-making practices, the panel in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) was not content merely to note that the actor was a municipal body. Rather, the Court went on to ascertain that the state legislature had expressly delegated ratemaking au-

thority to municipalities, *id.* at 1133. The legislature had also specifically charged municipalities with the duty of insuring a fair rate structure. The *Jeffrey* panel was unwilling to assume that the city council was doing anything other than carrying out this legislatively mandated duty when it took the actions complained of. *Id.* It will be observed that this is precisely the type of inquiry which our reading of *Goldfarb* and *Parker* would require. In our view, *Jeffrey* at least implicitly adopted the analysis which we have expressly employed today. The *Jeffrey* opinion, then, lends further support to our conclusion that, in the wake of *Goldfarb*, plaintiffs' interpretation of *Saenz* cannot be considered the law of this circuit.[10]

IV

To summarize, we conclude that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws. Upon remand, the court must determine whether the activities alleged fall within the intended scope of the powers granted to the Cities by the legislature. In their briefs on appeal, the Cities have provided copies of statutes which allegedly comprehend the acts involved in Power & Light's counterclaim. These are materials which should be submitted to the trial court in the first instance, together with all other relevant evidence.

REVERSED AND REMANDED, with directions.

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[10] We are also unpersuaded by plaintiffs' reliance upon *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir.), *cert. denied*, 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465 (1968). The various exemptions perceived by the *Alabama Power* panel were expressly derived from a judicial construction of the Rural Electrification Act in an antitrust context. No such problem of reconciling various federal statutes with one another is presented in the current appeal.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

D. C. Docket No. CA-73-1970 "E"

[TITLE OMITTED IN PRINTING]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1976

Issued at Mandate: Oct. 18, 1976

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1909

[TITLE OMITTED IN PRINTING]

Petition of the Appellees City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Rehearing en Banc

On May 27, 1976, a panel of this Court (Morgan, Clark and Tjoflat, Circuit Judges) rendered an opinion in this case which reversed and remanded, with directions, a judgment of the United States District Court for the Eastern District of Louisiana (Cassibry, J.). In so ruling the panel interpreted the Supreme Court's recent decision

in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) to require a departure from the holding in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) which the district court below had viewed as the controlling law in this Circuit relating to the applicability of the federal antitrust laws to the acts of the states and their political subdivisions.

The Appellees, the City of Lafayette, Louisiana, and the City of Plaquemine, Louisiana (Cities), hereby petition this Court, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 12 of the Local Rules of the United States Court of Appeals for the Fifth Circuit, for a rehearing of this appeal, *en banc*. The basis for this petition is the Cities' contention that the panel in its decision (by Tjoflat, Circuit Judge) has misapprehended the Supreme Court's opinion in *Goldfarb* v. *Virginia State Bar, supra,* and, as a result, has improperly and wrongly overruled this Court's prior decision in *Saenz, supra.*

Statement of the Case

As more fully stated in the Brief of the Appellees, (at pages 1-3) this is an appeal by Louisiana Power & Light Company (LP&L) from the district court's dismissal of LP&L's amended counterclaim which charged that the Cities had violated provisions of the federal antitrust laws, 15 U.S.C. § 1 *et seq.*, in the operation of their municipal electric utility systems.[1] In its decision the district court relied directly upon *Parker* v. *Brown*, 317 U.S. 341 (1943) and this Court's decision in *Saenz* to hold that the actions of these political subdivisions of the State of Louisiana were not subject to the strictures of the federal antitrust laws (Appendix pp. 54-59)

[1] The principal action, a damage suit by the Cities charging, *inter alia*, that LP&L and other investor owned utilities operating in Louisiana have combined and conspired to violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, is presently pending in the district court.

Argument

I. The Court's Opinion Misapprehends the Goldfarb Decision

The position of the Cities is that they are not subject to federal antitrust liability in the operation of their municipal electric utility systems under the *Parker* v. *Brown* doctrine.[2] *Parker* v. *Brown* held that the Congress in passing the Sherman Act did not intend to include "state action or official action directed by the state" within the Act's prohibitons. 317 U.S. at 351. This Court rejected the Cities' position on the basis of its interpretation of the *Goldfarb* decision, a case which was discussed at length in the briefs of both parties and during oral argument. In *Goldfarb* the Supreme Court was reviewing an antitrust challenge by a homeowner to the minimum fee schedule established by a county bar association for real estate title examinations. Also named as a defendant was the Virginia State Bar, the alleged enforcer of the fee schedule. In the Court of Appeals the Virginia State Bar had been successful in arguing that under the *Parker* v. *Brown* doctrine, as an agent of the state, it was not subject to the Sherman Act. The *Goldfarb* Court reaffirmed the *Parker* v. *Brown* doctrine that the Sherman Act "was intended to regulate private practices and not to prohibit a State from

[2] As the Cities stated in their Brief and in oral argument, sanctions may obtain either in state court or in the political arena for abuses of authority by public bodies. The question here is not whether the Cities may operate without restraint, but whether Congress intended the specific provisions of the federal antitrust laws to reach the actions of states and their political subdivisions. It is the Cities' contention that the Sherman Act is, and should be, "a prohibitation of individual not state action." *Parker* v. *Brown, supra,* at p. 352. It should also be noted that even though the acts of governmental entities are not covered by the Sherman Act's prohibitions, restraints upon interstate commerce by such bodies may be subject to attack in federal court under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3.

imposing a restraint as an act of government." (421 U.S. at 788) The Court, however, rejected the Virginia State Bar's attempt to avail itself of state action protection because it found that this organization of *private* attorneys although "a state agency for some limited purposes . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." (421 U.S. at 791-792) With relation to the alleged conduct, the Virginia State Bar was acting not as an agent of the State, but in the pecuniary interests of its private members.

Nevertheless, this Court viewed the Virginia State Bar as "a state agency by law" (Opinion at page 3647), considered it an unqualifiedly governmental institution and equated it with the Cities, which are political subdivisions of the State of Louisiana.[3] The Cities view this interpretation of *Goldfarb*, which is the basis for the Court's decision, to be in error, and the Court's pronouncement that "[t]he argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*" (Opinion at page 3649) to be an unwarranted and inappropriate expansion of the

[3] Footnote 6 of the Court's opinion states that the Cities have provided no authority for the proposition that the Cities are the equivalent of the State of Louisiana for the purposes of determining "state action". To the contrary, the Cities cited and provided in the Addendum to their Brief the Louisiana constitutional and statutory provisions which created the Cities as political subdivisions of the state and delegated the Cities plenary authority to own, operate and govern the conduct of their municipal electric utility systems. Under such delegations these state governmental bodies operate with the full authority of the State of Louisiana. Additionally, the Court in *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363 (9th Cir. 1974) saw no distinction between the state and its political subdivisions in applying the *Parker* v. *Brown* doctrine, *see* 501 F. 2d at 370, n. 15.

holding in *Goldfarb*.[4] Such a reading of *Goldfarb* would seriously and unnecessarily erode the *Parker* v. *Brown* doctrine. It would make government subject to the Sherman Act, a proposition which the Supreme Court expressly noted in *Parker* v. *Brown* that Congress had rejected. 317 U.S. at 351.[5] Quite simply, *Goldfarb* did not address the present situation where an unquestioned state governmental entity is the alleged violator. The private character of the Virginia State Bar and its actions are critical to the *Goldfarb* decision. This Court erred when it failed to recognize those facts and ruled on the basis of *Goldfarb* that the Cities are subject to suit under the federal antitrust laws.

In its May 27, 1976 decision this Court makes only passing reference to *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974). (*See* Opinion p. 3648, n.8) In *New Mexico*, the State, on behalf of itself and all other public bodies in the State, brought an action alleging violations of the federal antitrust laws by suppliers of asphalt. One of the defendants filed an antitrust counterclaim against the State and its political subdivisions charging a conspiracy between them in the purchase of asphalt. Following *Parker* v. *Brown*, the Ninth Circuit affirmed the dismissal

[4] The Supreme Court has itself often warned against extending its rulings beyond the facts of the case in which they were presented. *See Cohens* v. *Virginia*, 19 U.S. 264 (1821); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *United States* v. *Nerfert-White Co.*, 390 U.S. 228, 231 (1968).

[5] The Cities' Brief at pages 4-11 discusses at some length the body of case law which supports the conclusion that the Sherman Act is not applicable where the alleged violator is truly a state or a state government entity. With the exception of *Saenz* v. *University Interscholastic League, supra*, and *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363 (9th Cir. 1974), the Court's opinion in this case does not deal with these cases. It was apparently the Court's view that these decisions were not relevant under its interpretation of *Goldfarb*.

of the counterclaim. The *New Mexico* Court held the Sherman Act was not intended to apply to the activities of a state. Where the state and its political subdivisions were the alleged actors the court found no necessity to review any "legislative mandate." The court stated that "there is no indication . . . that the legislature must declare its intent to supplant competition in an industry when there is no question that the conduct is committed by the state." 501 F.2d at 369-370. *New Mexico* is, therefore, in direct conflict with the Court's decision here. The Court's declination to follow *New Mexico* is, however, based solely upon its erroneous interpretation that *Goldfarb* dealt with the actions of a state governmental entity. As we noted above the element of private precuniary interest was critical in *Goldfarb*.

Even more importantly for the purpose of this petition, the Court used its interpretation of *Goldfarb* as its rationale for avoiding this Circuit's 1973 holding in *Saenz*. In *Saenz*, the Court ruled that the University Interscholastic League was a part of the University of Texas and "a governmental entity outside the ambit of the Sherman Act" and repeated the doctrine established under *Parker* v. *Brown* that . . . "it is well settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action." 487 F.2d at 1028. In *Saenz* the Court properly required no inquiry into the scope of authority granted this bureau of the Extension Division of the University of Texas. The Court was satisfied with the lower court's determination that the bureau was a "governmental entity." See 487 F.2d at 1027.

As an alternative to a complete repudiation of *Saenz* on the strength of its interpretation of *Goldfarb*, the Court's opinion here attempts a difficult reconciliation. This is done by concluding that "[i]t can scarcely be doubted that the agency's actions were within the contemplated scope of the powers conferred upon the state university

system (of which the agency was a part) by the Texas legislature." (Opinion at page 3649) The Cities respectfully note that the *Saenz* opinion contains no analysis of the powers conferred upon the University of Texas by the Texas legislature, and whether or not the agency's conduct was within the legislative intent or even contemplated by the legislature is matter for conjecture only and certainly open to some doubt.

It appears, therefore, that the Court must look to *Goldfarb* alone as its basis for avoiding the holding of *Saenz*. And, as we have stated, the *Goldfarb* opinion rests upon facts so distinguishable from those now before the Court as to raise serious questions as to the propriety of the Court's current departure from established law.

Additional support for the Cities argument that *Goldfarb* does not conflict with *New Mexico* or *Saenz* may be found in *United States* v. *Oregon State Bar*, 385 F. Supp. 507 (D. Ore. 1974). The *Oregon State Bar* case was an antitrust challenge to a minimum fee schedule involving facts nearly identical to those in the *Goldfarb* case. In both Virginia and Oregon the state bar is an association of private attorneys invested with limited duties by the state. *Oregon State Bar* was decided in the Ninth Circuit after that Circuit's ruling in *New Mexico*. The Oregon district court found no conflict between the *New Mexico* decision and its own ruling, which was prophetic of the later *Goldfarb* decision, that the State Bar's fee setting activity was subject to scrutiny under the Sherman Act.

The court in *Oregon State Bar* correctly viewed *New Mexico* as holding that "if a state itself is the defendant in an antitrust suit, no further analysis is required before dismissing the claim pursuant to the state action doctrine." 385 F. Supp. at 510. The Oregon district court accepted the distinction which the Cities urge here—the distinction between an association of private

attorneys with limited state authority and the state or its political subdivisions—and ruled that a legislative mandate test must be applied to determine whether state action is involved where the alleged violator *is not* the state. *See* 385 F. Supp. at 511. Under such an analysis it is evident that *Goldfarb* is not in conflict with either *New Mexico* or *Saenz*.[6] Likewise, in the instant case, *Goldfarb* does not require reversal of the district court's action.

II. Reversal of the District Court Requires an En Banc Decision by This Court

The Court in its opinion acknowledged the established Fifth Circuit rule that one panel cannot overrule the holding of a previous panel of the same court. The Cities had in their Brief reminded the Court that "a panel of this Court cannot overrule a prior decision of the Circuit, *en banc* consideration being required". *United States* v. *Lewis*, 475 F. 2d 571, 574 (5th Cir. 1972).[7] The Cities retain their conviction that, in view of the holding in *Saenz*, an *en banc* decision is necessary if this Court is properly to reverse the decision of Judge Cassibry in the district court.

The Court's opinion, however, seeks to avoid this requirement of an *en banc* determination with a two part

[6] In their Brief the Cities provide a structure for reconciling the various factual circumstances which give rise to *Parker* v. *Brown* issues and analyzing the legal standards to be applied. (See Appellees Brief at pages 18-24). This discussion illustrates the basis for applying varied tests depending upon the degree of private involvement in the alleged anticompetitive conduct.

[7] *See also, United States* v. *Automobile Club Ins. Co.*, 522 F. 2d 1 (5th Cir. 1975); *Puckett* v. *Commissioner of Internal Revenue*, 522 F. 2d 1385 (5th Cir. 1975); *Lineberry* v. *United States*, 512 F. 2d 510 (5th Cir. 1975); *United States* v. *Bailey*, 468 F. 2d 652 (5th Cir. 1972); *United States* v. *Hereden*, 464 F. 2d 611 (5th Cir.), *cert. denied*, 409 U.S. 1028 (1972).

analysis. First, the Court states that it does not regard its opinion in this case as irreconcilably inconsistent with *Saenz*. This determination is grounded in the Court's conclusion that the state agency in *Saenz* acted within the scope of a legislative mandate of the State of Texas. As the Cities illuminated above such a conclusion is unsupported by the *Saenz* opini ↵.

Second, the Court, accepting arguendo that *Saenz* held that state governmental bodies are not subject to the Sherman Act, views *Goldfarb* as an intervening Supreme Court precedent which dictates a departure from the holding of *Saenz*. Given the inherent weakness in the Court's first approach, this must, indeed, be the rationale for avoiding the rule requiring *en banc* review. The Cities must repeat their conviction that this determination is erroneous. *Goldfarb* was decided upon facts significantly different from those before this Court. Nothing in the Supreme Court's opinion compels or suggests that its analysis should be extended to include true state governmental entities. Indeed, a fair reading of *Goldfarb* indicates that a different result would have obtained had the Supreme Court of Virginia approved the minimum fee schedule and had it been named as the defendant in that action.

In support of its position that *Goldfarb* represents an intervening Supreme Court decision dictating a departure from *Saenz*, the Court cites *Jeffrey* v. *Southwestern Bell*, 518 F. 2d 1129 (5th Cir. 1975) as tacit recognition by this Circuit that *Goldfarb* requires an examination of legislative intent where the government is the actor. The Court sees *Jeffrey* as its own departure from *Saenz*. *Jeffrey*, however, is a substantially different kind of application of the *Parker* v. *Brown* doctrine. *Jeffrey* was an action between private parties. There residential telephone subscribers sought to challenge certain pricing practices of the telephone company as monopolistic and

in violation of the Sherman Act. The telephone company's defense relied, in part, upon the fact that under state law its rates were regulated by the City of Dallas. The decision of the Court in *Jeffrey*, that such rates were immune from antitrust challenge under the state action doctrine of *Parker* v. *Brown*, was not unique, nor did it depend upon *Goldfarb*. As stated in *Jeffrey*, primary reliance was placed on two previous rate cases in the Circuit, *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F. 2d 672 (5th Cir.), *cert. denied*, 393 U.S. 488 (1968) and *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F. 2d 1135 (5th Cir. 1971). Moreover, *Jeffrey* did not involve allegations of anticompetitive conduct by a governmental body. The City of Dallas was not a defendant and it was not alleged to have violated the federal antitrust laws. Cases such as *Jeffrey*, involving alleged private action, require a different analysis than that necessary where governmental entities are the alleged violators. See, *New Mexico*, *supra*, at 369-70.[8] *Jeffrey* is not in conflict with *Saenz* where the actor-defendant was an agency of the state. Likewise, the *Jeffrey* decision provides no basis for concluding that the Court's opinion in this case may depart from the holding of *Saenz* without consideration by the entire court. Indeed, the Court in *Jeffrey* did not reverse *Saenz or* even imply that its doctrine was no longer the law in this Circuit. The Cities submit that *Goldfarb* is not an intervening Supreme Court decision which dictates a departure from *Saenz* and that the Court's decision in this case must be viewed as overruling a prior panel's holding in derogation of this Court's longstanding rule against such action absent *en banc* consideration.

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[8] The Cities again recommended that the Court review pages 18-24 of their Brief which suggests a conceptual structure for analyzing the various categories of *Parker* v. *Brown* cases. This discussion illustrates the different levels of analysis necessary under varied fact patterns.

III. Public Policy Considerations

This petition has demonstrated two things: (1) that the Court misapprehended the *Goldfarb* decision and erred in its conclusion that *Goldfarb* required reversal of the district court in this case, and (2) that the Court erred in overruling the existing law in this Circuit without an *en banc* determination. In addition, however, attention should be drawn to the Court's apparent lack of concern for the public policy considerations and the practical ramifications attending its action. Although the Cities devoted a section of their Brief to such consideration (*see* Brief at pages 30-31), the Court's opinion is barren of any reflection on the important public policy issues raised by its ruling.

The Court's action in this case will necessarily open the door to antitrust attack aimed at the broad range of activities and services rendered by state and local government. Heretofore, such governmental entities have acted at the behest of their citizenries to provide services in the manner prescribed by local choice. The Court's decision would place the public acts of locally elected officials under the scrutiny of the federal antitrust laws, laws which were enacted for quite a different purpose, to protect against abuses of private economic power. *Parker* v. *Brown*, *supra* at 351; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 492-93 (1940).

Under the Court's decision general legislative authority to operate municipal electric utility systems, which is present in the instant case, or to provide other city services, such as mass transportation, would leave local governments open to antitrust attack from private interests unless it could be proved that the questioned activity was "clearly within the legislative intent . . . (and) that the legislature contemplated the kind of action complained of." (Opinion at page 3648).

For example, a city with the authority to operate a municipal bus system may well find itself liable for treble damages to a private concern which wishes to but is prevented from establishing a competing busline despite the fact that the local government has determined that duplication of such services would be inefficient and in derogation of the public safety, comfort and welfare. Likewise, a city's grant of a concession or franchise to provide goods or services would be subject to antitrust attack. Disgruntled suppliers, as was the case in *Saenz,* may file, or threaten to file, antitrust charges with some frequency. In such cases the city officials could be charged as co-conspirators and face substantial monetary liability. Even if they are eventually successful in defending such an action the cost of this defense and the chilling effect created would adversely affect the quality of public service.

Grants of legislative authority are generally not made with reference to specific means. Wisely, state legislatures allow their political subdivisions latitude to exercise their specialized judgment as to the manner in which public services are delivered. The choice now will be between overly specific and detailed legislation and the threat of enormous exposure to liability in the federal courts.[9] Congress in enacting the federal antitrust laws never contemplated or intended local governments to be placed in such dilemma. *Parker* v. *Brown, supra,* at 351. The wiser course would be to leave entities of state government free to make their own judgments subject to the protections afforded by state law and the state's own political processes.

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[9] The threat of large damage claims is not an imaginary horrible. At the oral argument in this case, counsel for LP&L announced that it's alleged damages stemming from just one of the four counterclaims were estimated at approximately $500 million. The Cities exposure in this case after trebling could exceed $1.5 billion, an enormous bill for a few thousand taxpayers to meet.

Conclusion

The Cities retain their belief that the Congress did not intend the states and their political subdivisions to be covered by the provisions of the federal antitrust laws and subjected to the potential of treble damage liability for their governmental acts. The Cities respectfully request that this Court grant this petition for rehearing *en banc* in order that this important issue may be presented to the entire Court for its consideration.

Respectfully submitted,

/s/ Jerome A. Hochberg
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Ivor C. Armistead, III
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Dated: June 9, 1976

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Counsel
John P. McKenna

July 16, 1976

Edward W. Wadsworth
Clerk, United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: City of Lafayette, Louisiana and City of Plaquemine, *Louisiana* v. *Louisiana Power & Light Company No. 75-1909*

Dear Sir:

For the second time since the Appellees, the Cities of Lafayette Louisiana and Plaquemine, Louisiana ("Cities"), filed their petition for rehearing of this appeal *en banc*, the Cities are compelled to bring to the Court's attention a recent decision of the Supreme Court relevant to the issue presently before the Court.[1] While we regret presenting these cases in such a piecemeal fashion, we think that these end of term Supreme Court decisions are of critical importance to the Court's deliberation in this case and, therefore, something the Court would want presented.

[1] By letter dated June 25, 1976 the Cities brought the Supreme Court's in *The National League of Cities* v. *Usery*, — U.S. —, 44 U.S. Law Week 4974 (June 24, 1976) to the attention of this Court.

On July 6, 1976 the Supreme Court rendered its decision in *Cantor* v. *The Detroit Edison Company*, — U.S. —, 44 U.S. Law Week 5357. The opinions in *Cantor* shed important new light on the *Parker* v. *Brown* doctrine and the application of the Sherman Act to the actions of state governmental bodies. The plurality opinion of Mr. Justice Stevens (44 U.S.L.W. at 5360-61 and 5363-64), the concurring opinion of Mr. Chief Justice Burger (44 U.S.L.W. at 3564-65), the concurring opinion of Mr. Justice Blackmun (44 U.S.L.W. at 5367 n. 5), and the dissenting opinion of Mr. Justice Stewart (44 U.S.L.W. at 5370 and 5374-75) give strong support for the Cities' position before this Court that its May 27, 1976 opinion in this case misapprehends the Supreme Court's 1975 decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (see, Petition of the Appellees City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Rehearing *En Banc* filed on June 9, 1976).

The opinions in the *Cantor* case clarify two points which are extremely relevant to this appeal and the Cities' request for rehearing. First that the *Goldfarb* case fell outside of the *Parker* v. *Brown* doctrine because the alleged anticompetitive effect was the result of private action and not action by the state or a state governmental entity and second, that *Parker* v. *Brown* held the actions of state governmental bodies and officials to be outside the scope of the scope of the Sherman Act (*see*, 44 U.S.L.W. at 5360-61).

The panel which decided this appeal based its ruling on the intervening authority of *Goldfarb* asserting that the *Goldfarb* legislative mandate test applied to governmental bodies. The *Cantor* decision indicates that the test of Sherman Act applicability turns on who the actors are and confines the *Goldfarb* holding to situations involving private parties. Additionally, the panel's May 27, 1976 determination to avoid the prior law in this Circuit (principally *Saenz* v. *University Interscholastic League*, 487 F. 2d

1026 (5th Cir. 1973)) was based upon the panel's interpretation that Goldfarb modified *Parker* v. *Brown*. The *Cantor* decision makes it clear that such was not the case. In fact, every opinion in Cantor, including the dissent, takes the position that *Parker* v. *Brown* held that state governmental bodies and officials are not subject to the Sherman Act.

We think the *Cantor* decision calls for reversal of the panel in this case. But, at the very least, *Cantor* raises substantial questions as to the propriety of the panel's interpretation of *Parker* v. *Brown* and *Goldfarb* and speaks forcefully in favor of a rehearing of this appeal.

We are enclosing 15 copies of this letter and the attached *Cantor* decision. We would appreciate your distributing these to the Court in aid of its deliberation.

Sincerely yours,

/s/ Jerome A. Hochberg
Jerome A. Hochberg
Attorney for the City of Lafayette, Louisiana and the City of Plaquemine, Louisiana

JAH:llk

cc: Andrew P. Carter, Esq.
Attorney for the Appellant,
Louisiana Power & Light Company

Enclosures [Enclosures not printed]

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
OFFICE OF THE CLERK

October 4, 1976

To All Counsel of Record

No. 75-1909—City of Lafayette, LA and City of Plaquemine, LA v. Louisiana Power & Light Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk
/s/ By Susan M. Graves, Deputy Clerk

/smg

cc: Mr. Andrew P. Carter
Mr. Tom F. Phillips
Mr. Jerome A. Hochberg
Mr. Robert C. McDiarmid
Mr. Robert E. Winn

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

CITY OF LAFAYETTE, LOUISIANA, and
CITY OF PLAQUEMINE, LOUISIANA,
Plaintiffs and Appellees,
v.
LOUISIANA POWER & LIGHT COMPANY,
Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Motion of the Appellees City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Stay of the Issuance of the Mandate Pending Petition for Writ of Certiorari

The Appellees, City of Lafayette, Louisiana and City of Plaquemine, Louisiana ("Cities") hereby move this Court for an order staying the issuance of the mandate in this case for 90 days pending the filing by the Cities of a petition for a writ of certiorari to this Court in the Supreme Court of the United States. This motion is made under the provisions of 28 U.S.C. § 2101(f) and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. In support of this motion the Cities state as follows:

1. That on May 27, 1976 this Court entered judgment and rendered an opinion in this case which reversed and remanded a judgment of the United States District Court for the Eastern District of Louisiana dismissing a counterclaim filed by Louisiana Power & Light Company ("LP&L").

2. That on June 9, 1976 the Cities timely filed a petition for rehearing of the appeal en banc.

3. That on October 4, 1976 this Court entered an order denying the Cities' petition for rehearing.

4. That it is the intention of the Cities to petition the Supreme Court of the United States for a writ of certiorari.

5. That because of the complexity of the issues raised by this appeal, and the current schedule of depositions to be taken in the Cities action against LP&L, the principal action which remains pending in the district court,[1] the preparation of the Cities' petition for a writ of certiorari may require the full 90 days provided by law, 28 U.S.C. § 2101(c).

THEREFORE, the Cities respectfully request that this Court grant the Cities' motion for an order staying the issuance of the mandate in this case for 90 days, or for whatever period the Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ JEROME A. HOCHBERG
Jerome A. Hochberg
JAMES F. FAIRMAN, JR.
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202/293-2170
Attorneys for the Plaintiffs-Appellees

Dated: October 8, 1976

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[1] *City of Lafayette, Louisiana and City of Plaquemine, Louisiana* v. *Louisiana Power & Light Company et al.*, Civil Action No. 73-1970, Section E (E.D. La.)

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1909

[TITLE OMITTED IN PRINTING]

Opposition to Motion to Stay Mandate

Louisiana Power & Light Company (LP&L), Appellant herein, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure hereby responds to the Motion of the Appellees, City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Stay of the Issuance of the Mandate Pending Petition for Writ of Certiorari and opposes said motion for the reasons set forth herein:

1.

No cause has been shown for the stay of ninety days, requested by Appellees, as would be required by Rule 41(b).

2.

Appellees have been on notice of this Court's opinion since May 27, 1976. Appellees have known that the matter decided presents an important issue of principle that would likely be addressed in a petition of writ of certiorari to the Supreme Court in any event. Accordingly they have already had ample time to formulate the argument they would advance to the Supreme Court.

3.

The final order dismissing LP&L's counterclaim against Appellees was entered by the court below in March 1975. LP&L has thus already been delayed in the prosecution of its counterclaim for well over a year.

4.

The complaint now being prosecuted by the Cities of Lafayette and Plaquemine has common issues of law and fact and identity of parties with LP&L's counterclaim.

Further delay may impair the ability of the Court below to proceed with the litigation in an orderly fashion.

For example, in their demand plaintiffs allege that LP&L has engaged in a monopolistic refusal to deal. LP&L will show in defense to that charge that the Cities, not LP&L, engaged in a bad faith refusal to deal. Since the refusal to deal allegation by the Cities was also made in connection with the Cities' numerous other suits in other fora, the issue has a direct bearing upon LP&L's charge that the Cities have engaged in sham and frivolous litigation, knowing that their cause was false.

5.

This matter is before the Court solely on the question of whether LP&L has stated a claim upon which relief may be granted. Even if the Supreme Court were ultimately to disagree with this Court's opinion, plaintiffs would suffer no prejudice by proceedings in the Court below pending that determination. They would be in the same situation as if the Court below had not erroneously dismissed LP&L's counterclaim. It is LP&L that would suffer prejudice if further delay be had.

WHEREFORE, Appellant Louisiana Power & Light Company respectfully prays that this Honorable Court totally deny Appellees' Motion for Stay of Mandate.

Respectfully submitted,

MONROE & LEMANN
ANDREW P. CARTER
W. MALCOLM STEVENSON
WILLIAM T. TETE

By: /s/ ANDREW P. CARTER
1424 Whitney Bank Building
New Orleans, Louisiana 70103

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this 13th day of October, 1976 caused to be mailed, postage prepaid, a copy of the foregoing to counsel of record for each party to this proceeding including Mr. Jerome A. Hochberg, Attorney at Law, 1990 "M" Street, N.W., Washington, D. C. 20036.

/s/ William T. Tete

Dated: October 13, 1976

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1909

[TITLE OMITTED IN PRINTING]

(Filed: October 18, 1976)

Order

The motion of appellees for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ....., the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ GERALD BARD TJOFLAT
United States Circuit Judge